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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

TODD BETH et al., **Plaintiffs and Appellants,** **v.** **EVERETT C. DOUGHTY III,** **Defendant and Respondent.**	**A121729** **(Sonoma County Super. Ct. No. SCV-237740)**

The parties have been involved in a dispute and related litigation over their residential lease option agreement for more than five years. In 2005, a trial court issued a declaratory judgment in favor of plaintiffs Todd and Lisa Beth. Defendant Everett C. Doughty III appealed, and in January 2007 this court affirmed. Following issuance of that declaratory judgment, plaintiffs sought to tender performance, which defendant rejected on the basis that he had appealed the judgment. Soon thereafter, plaintiffs filed the current action for breach of contract. In 2008, the trial court rendered judgment for defendant, concluding evidence of plaintiffs' tender was barred by the automatic statutory stay of Code of Civil Procedure section 916.[1] We disagree and reverse.

[1] All undesignated section references are to the Code of Civil Procedure.

BACKGROUND

In February 2002, plaintiffs signed a residential lease option agreement (the contract) to purchase defendant's Santa Rosa home. The contract provided that if plaintiffs exercised their option between March 1, 2003, and February 28, 2004, the purchase price would be based in part on the market value of the property, but the property would not be sold for less than $385,000. On February 5, 2004, plaintiffs informed defendant of their intent to exercise their option to purchase the property, but the parties were unable to agree on a mechanism to determine the property's fair market value.

In May 2004, plaintiffs sued defendant for breach of the contract, specific performance, damages, and declaratory relief, and defendant cross-complained for breach of contract and declaratory relief. (*Beth v. Doughty* (Super. Ct. Sonoma County, 2005, No. SCV-234887).) The case was tried by the court solely on the parties' causes of action for declaratory relief. The trial court entered judgment in favor of plaintiffs after concluding the contract was enforceable and valid, the property's fair market value should be determined as of February 6, 2004, and the property's value on that date was $439,000 (hereafter 2005 judgment). The 2005 judgment stated, in relevant part: "This [c]ourt hereby declares that the Purchase Agreement attached as an exhibit to plaintiffs' complaint is valid and enforceable, that the date of valuation for plaintiffs' option to purchase the property shall be February 6, 2004, and that the value as of that date was $439,000. It is this number that shall be used in calculating the purchase price pursuant to the terms of the contract. [¶] Plaintiffs are the prevailing parties and may seek all appropriate costs."

On July 22, 2005, plaintiffs advised defendant that in light of the 2005 judgment, plaintiffs would be opening escrow to purchase the property, and explained their understanding of the terms of the purchase. On August 11, plaintiffs provided defendant with their escrow number. On August 16, defendant responded that opening the escrow was premature as he was considering whether to appeal the 2005 judgment, and, if he appealed, the sale could not take place until the appeal was concluded.

On August 17, 2005, defendant filed his notice of appeal from the 2005 judgment, challenging the trial court's determinations of the date for valuation of the property, that the contract was enforceable and valid, and the court's award of attorney fees and costs. (*Beth v. Doughty* (Jan. 22, 2007, A111317 & A113041) [nonpub. opn.]) (*Beth I*).)

On August 18, 2005, plaintiffs informed defendant that the lack of finality of the 2005 judgment did not obviate his obligation to sell them the property, and if he refused to sell, he would be in breach of contract.

On September 23, 2005, plaintiffs sent defendant a letter informing him that they had obtained loan approval and were prepared to close escrow, but needed access to the property in order to obtain a lender appraisal. Plaintiffs requested that defendant either immediately make the property available for the appraisal or advise them he was repudiating his obligation to tender the deed into escrow.

On September 26, 2005, defendant responded that the *Beth I* appeal of the 2005 judgment stayed all matters, including enforcement of the judgment, and therefore plaintiffs' pursuit of the sale was inappropriate. On September 30, plaintiffs reiterated, "although the appeal may stay the enforcement of the judgment, it does not place a hold on the parties' contractual obligations. [Defendant] still has an obligation to perform pursuant to the contact."

On November 9, 2005, plaintiffs filed the instant action against defendant for "breach of contract - specific performance" and "breach of contract - damages" alleging defendant "repudiated his obligations to perform under the [contract] by claiming that he has no such obligation until there has been a final judgment in a related action [*Beth I*]," and by refusing to perform unless plaintiffs deposit more money than required under the contract. (*Beth v. Doughty* (Super. Ct. Sonoma County, 2008, No. SCV-237740).) Defendant cross-complained for breach of contract.

On January 22, 2007, this court issued its opinion in *Beth I*, affirming the 2005 judgment.[2] In February, defendant advised plaintiffs that he was prepared to place the deed in escrow. On March 28, the remittitur issued in *Beth I*. In June and July, the parties unsuccessfully attempted to settle the matter.

On August 9, 2007, the trial court denied plaintiffs' motion in limine to admit evidence of their September 23, 2005 letter to defendant in support of plaintiffs' instant breach of contract claims. The court explained that pursuant to section 916, the 2005 judgment was automatically stayed as of August 17, 2005, when defendant filed his appeal from the 2005 judgment. Therefore, as of September 23, defendant had no duty to perform and the letter was "legally irrelevant and inadmissible."[3] Thereafter, the parties again unsuccessfully sought to settle the matter.

In November 2007, defendant filed an amended cross-complaint adding new allegations regarding plaintiffs' failure to perform under the contract after the remittitur issued in *Beth I*. Thereafter, plaintiffs filed a "First Supplement to Complaint" alleging that on July 20, 2007, they again tendered performance under the contract and, on July 25, defendant rejected their tender of performance, thereby repudiating the contract.

A court trial ensued on May 19, 2008. Plaintiffs dismissed all of the claims in their complaint and supplement to the complaint except those related to the damages claimed for defendant's 2005 breach of the contact. Plaintiffs' counsel made an offer of proof that plaintiffs' remaining breach of contract claim would require the admission of evidence of plaintiffs' tenders and defendant's repudiations in 2005, and evidence regarding the difference between the purchase price prescribed in the lease option agreement and the value at the time of defendant's 2005 repudiation. The court again

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[2] We upheld the trial court's determinations that February 6, 2004, was the proper date of valuation of the property, the lease option was valid and enforceable, and plaintiffs were entitled to attorney fees and costs. (*Beth I, supra*.)

[3] In October 2007, plaintiffs sought a writ of mandate from this court challenging the in limine ruling. The petition was denied on procedural grounds. (*Beth v. Superior Court* (Nov. 1, 2007, A119393) [order denying writ].)

ruled that the proffered evidence was irrelevant and inadmissible because there was a stay in effect at the time of the 2005 tenders and alleged repudiations. The court entered judgment in favor of defendant (hereafter 2008 judgment). Defendant voluntarily dismissed his amended cross-complaint. Plaintiffs filed a timely notice of appeal from the 2008 judgment.

DISCUSSION

Plaintiffs contend the trial court erred in determining that pursuant to section 916,[4] the *Beth I* appeal of the 2005 judgment barred plaintiffs from tendering their performance under the parties' contract. Plaintiffs argue the 2005 judgment was not subject to the automatic stay pursuant to section 916 because it was declaratory in nature; it compelled no trial court action and did not order the parties to do anything or refrain from doing anything. Instead, they argue the 2005 judgment was self-executing, requiring only nonjudicial action by the parties.

A stay, obtained by any method, suspends the right to enforce a judgment or order by execution or other means. (See generally § 916 et seq.; *Dulin v. Pacific W. & C. Co.* (1893) 98 Cal. 304, 306 *(Dulin)*; 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, §§ 221-222, pp. 289-290.) Section 916 provides for the stay of proceedings by the perfecting of an appeal. Section 916, subdivision (a), states that with the exception of various express statutory exceptions not applicable here,[5] "the perfecting of an appeal

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[4] Section 916 states:

"(a) Except as provided in Sections 917.1 to 917.9, inclusive, and in Section 116.810, the perfecting of an appeal stays proceedings in the trial court upon the judgment or order appealed from or upon the matters embraced therein or affected thereby, including enforcement of the judgment or order, but the trial court may proceed upon any other matter embraced in the action and not affected by the judgment or order.

"(b) When there is a stay of proceedings other than the enforcement of the judgment, the trial court shall have jurisdiction of proceedings related to the enforcement of the judgment as well as any other matter embraced in the action and not affected by the judgment or order appealed from."

[5] As an exception to the automatic stay rule, section 917.4 provides that "[t]he perfecting of an appeal shall not stay enforcement of the judgment or order" directing

stays proceedings in the trial court upon the judgment or order appealed from or upon the matters embraced therein or affected thereby, including enforcement of the judgment or order."

"The purpose of the automatic stay provision of section 916, subdivision (a) 'is to protect the appellate court's jurisdiction by preserving the status quo until the appeal is decided. The [automatic stay] prevents the trial court from rendering an appeal futile by altering the appealed judgment or order by conducting other proceedings that may affect it.' [Citation.] [¶] To accomplish this purpose, section 916, subdivision (a) stays all further trial court proceedings 'upon the matters embraced' in or 'affected' by the appeal." (*Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 189 (*Varian*).) This stay does not render the appealed judgment or order null and void. (*McFarland v. City of Sausalito* (1990) 218 Cal.App.3d 909, 912.) The trial court retains jurisdiction to proceed upon " 'ancillary or collateral matters which do not affect the judgment [or order] on appeal.' " (*Varian*, at p. 191.)

However, if the judgment or order is self-executing, there is nothing to be stayed pursuant to section 916 after the filing of a notice of appeal. (*Bulmash v. Davis* (1979) 24 Cal.3d 691, 698, fn. 3; *Boggs v. North American Bond etc. Co.* (1936) 6 Cal.2d 523, 525-526; *Dulin*, *supra*, 98 Cal. at p. 307; *Veyna v. Orange County Nursery, Inc.* (2009) 170 Cal.App.4th 146, 150, 156 (*Veyna*).) "The term 'self-executing' is practically self-defining, and obviously denotes a judgment that accomplishes by its mere entry the result sought, and requires no further exercise of the power of the court to accomplish its purpose." (*Feinberg v. One Doe Co.* (1939) 14 Cal.2d 24, 29; accord, *Estate of Dabney*

"the sale, conveyance, or delivery of possession of real property which is in the possession or control of the appellant or the party ordered to sell, convey or deliver possession of the property, unless an undertaking in a sum fixed by the trial court is given . . . ." The parties agree this exception does not apply because the 2005 judgment did not order the transfer of the property.

(1951) 37 Cal.2d 402, 409; *Solorza v. Park Water Co.* (1947) 80 Cal.App.2d 809, 812-814; 4 Cal.Jur.3d (2007) Appellate Review, § 408, p. 603.)[6]

In *Veyna*, the minority shareholder plaintiffs brought an action for involuntary dissolution of a corporation. To avoid dissolution, the corporation elected to buy out the plaintiffs. The trial court entered a decree fixing the fair value of the plaintiff's shares and ordered that unless the corporation made payment for the shares by a particular date, judgment would be entered winding up and dissolving the corporation. Without making the required payment, the corporation filed a notice of appeal, asserting that the filing of the appeal automatically stayed the decree's requirement that payment be made for the shares. (*Veyna, supra,* 170 Cal.App.4th at pp. 148-150.) Thereafter, the corporation petitioned the Court of Appeal for a writ of supersedeas to stay the decree pending the appeal. (*Id.* at pp. 150, 154.) The Court of Appeal gave two alternate reasons for concluding that the automatic stay did not apply. First, the statutory buy-out procedure is a " 'special proceeding' " to which section 916 does not apply. (*Veyna,* at pp. 154-155.) Second, as relevant here, the trial court's decree was self-executing because no further

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6 Self-executing judgments and orders arise in numerous contexts. Examples of self-executing judgments include those: granting or dissolving a prohibitory injunction (see *Agricultrual Labor Relations Bd. v. Tex-Cal Land Management, Inc.* (1987) 43 Cal.3d 696, 709; *Atwood v. Hammond* (1935) 4 Cal.2d 31, 46; *Wolf v. Gall* (1916) 174 Cal. 140, 141-142); determining the status of an individual with respect to granting or denying a dissolution of marriage, or quieting title to real property (*Dulin, supra,* 98 Cal. at p. 307); revoking the probate of a will (*Estate of Crozier* (1884) 65 Cal. 332, 333-334); and removing a testamentary trustee and appointing a successor (*Stewart v. Hurt* (1937) 9 Cal.2d 39, 42).

Examples of self-executing orders include those: dissolving a water company and directing the distribution of its assets through the company's directors as trustees (*In re Imperial Water Co. No. 3* (1926) 199 Cal. 556, 557-561); quashing execution of a writ levied on property (*Hulse v. Davis* (1927) 200 Cal. 316, 317); dismissing a petition for postponement of a sale by a trustee (*Boggs v. North American Bond etc. Co., supra,* 6 Cal.2d at p. 525); granting leave to file a claim against an estate (*Lobrovich v. Georgison* (1956) 144 Cal.App.2d 567, 574); and vacating a judgment (*Bulmash v. Davis, supra,* 24 Cal.3d at p. 698, fn. 3).

trial court action was required: if the corporation did not purchase the shares by the specified date a judgment dissolving the corporation would be entered. (*Id.* at p. 156.)[7]

Self-executing judgments or orders may also arise in the context of judgments or orders that are in essence declaratory. Our Supreme Court's decision in *Dulin* is instructive. In *Dulin,* the plaintiff (Dulin) brought an action to set aside the election of defendant Clugston as a director of the defendant corporation and to confirm the election of himself as director. The trial court's judgment declared that Dulin had been duly elected and his election should be confirmed, and that Clugston had not been elected as director. (*Dulin, supra,* 98 Cal. at p. 305.) Clugston and the corporation appealed and sought an order staying the proceedings and enjoining Dulin from acting as a director, officer, or manager of the corporation, or interfering with the corporation's management by Clugston and the other directors. Meanwhile, after the judgment entered in favor of Dulin, the corporation brought a separate action against Clugston to prevent him from trespassing on its property or interfering with its possession. As a result of that action, Dulin took possession of the corporation and began to act as its president and director and Clugston was excluded from the corporation's management. Clugston and the corporation argued that their appeal barred Dulin from acting as the corporation's director and president and sought supersedeas to enforce the judgment. (*Id.* at pp. 305-306.)

Dulin stated: Former section 949[8] declared that "the perfecting of an appeal 'stays proceedings in the court below upon the judgment or order appealed from,' thus creating a statutory *supersedeas*, or 'a suspension of the power of the court below to issue an execution on the judgment or decree appealed from; or, if a writ of execution is issued, a

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[7] *Veyna* acknowledged that even though the decree was not statutorily stayed, the reviewing court had discretion to issue supersedeas upon a proper showing. (*Veyna, supra,* 170 Cal.App.4th at pp. 156-157.) However, the court declined to issue supersedeas on the ground that the corporation had not first sought that relief in the trial court. (*Id.* at pp. 150, 157-158.)

[8] Section 916 is derived in part from former section 949, which was repealed in 1968. (Stats. 1968, ch. 385, §§ 1, 2, p. 811; see Historical and Statutory Notes, 18 West's Ann. Code Civ. Proc. (2009 ed.) foll. § 916, p. 5.)

prohibition against the enforcement of the writ.' [Citation.]" (*Dulin, supra,* 98 Cal. at p. 306.) *Dulin* acknowledged that "[t]he appeal suspends [the judgment's] force as a conclusive determination of the rights of the parties . . . ." (*Id.* at p. 307; see *Caminetti v. Guaranty Union Life Ins. Co.* (1943) 22 Cal.2d 759, 766.) However, the court determined that the judgment was self-executing in that the judgment "limited [the trial court's] action to ascertaining the result of the election and did not grant any relief in the premises other than to confirm the election of Dulin and to declare that Clugston was not elected. No other proceedings have been had or attempted in the court below upon this judgment, and the judgment itself does not contemplate or authorize any other proceedings, or any process to enforce it." (*Dulin*, at pp. 308-309.)

In denying the request for supersedeas, *Dulin* held that while Dulin's assuming the role of director of the corporation "may be in consequence of the judgment, [it] is not a proceeding upon the judgment. The acts done and threatened by him were not done by virtue of the judgment, but in consequence of the recognition by his fellow-directors of his right to co-operate with them. The fact that the judgment was rendered in his favor may have been a motive governing the other directors in recognizing him as a fellow-director, and in admitting him to their counsels and excluding Clugston therefrom, but such action is independent of the proceeding in court." (*Dulin, supra,* 98 Cal. at p. 308.) *Dulin* reasoned that the injunctive relief Clugston sought on supersedeas would be contrary to the purpose of the former section 949 automatic stay, to maintain the status quo of the parties. Thus, "[t]he appeal from that judgment cannot confer upon Clugston any greater right to an injunction against Dulin than he had prior to its rendition." (*Dulin*, at p. 308.)

Like the aforementioned cases, the 2005 judgment in this case is self-executing in that it accomplishes by its mere entry the result sought, and requires no further exercise of the power of the court to accomplish its purpose. The parties sought only a declaration from the court as to the validity and enforceability of their lease-option contract, the date on which the property should be valued, and the property's fair market value on that date. The 2005 judgment accomplished what the parties sought, and neither required nor

directed any further court process. Moreover, the 2005 judgment did not reserve jurisdiction in the trial court to accomplish any matter related to the judgment.

While the filing of defendant's appeal did not stay enforcement of the judgment, "[t]he appeal suspends [the judgment's] force as a conclusive determination of the rights of the parties . . . ." (*Dulin, supra,* 98 Cal. at p. 307.) Moreover, filing the appeal did not preclude private efforts by the plaintiffs to enforce the lease option agreement or render those efforts inadmissible in the instant action. The appeal left "the parties in the same situation with reference to the rights involved in the action, as they were prior to the rendition of the judgment. They still have, notwithstanding the appeal, the same right to assert, outside of court, or in any other proceeding, their respective rights as they had prior thereto." (*Id.* at p. 308.) While plaintiffs' attempt to tender their performance under the parties' contract may have been "in consequence of the judgment," it was "not a proceeding upon the judgment," and was "not done by virtue of the judgment." (*Ibid.*)

Defendant argues that plaintiffs' filing of the present action and use of "the process of the court belies their attempt to characterize the [2005] judgment as 'self-executing.' " The answer to this argument is that whatever affirmative action may ultimately be required in order for plaintiffs to enforce the parties' contract will be independent of the underlying declaratory judgment action which sought nothing more than a judgment declaring the validity and enforceability of the contract, the valuation date of the property and the property's fair market value on that date. (See *People v. City of Westmoreland* (1933) 135 Cal.App. 517, 521 [that further court action may be necessary to wind up affairs of city after judgment declared city not legally incorporated does not render judgment not self-executing].)

Defendant relies primarily on *Royal Thrift & Loan Co. v. County Escrow, Inc.* (2004) 123 Cal.App.4th 24 (*Royal Thrift*) in arguing that section 916 applied to stay plaintiffs' attempt to tender performance under the parties' contract. In that case the trial court's declaratory judgment stated that the defendant mortgage lender held a valid first trust deed on the plaintiffs' property. The judgment also declared that the lender had suffered no present damages for nonpayment of the loan since it retained the right to

foreclose on the deed of trust secured by the property. The judgment further stated that the court specifically retained jurisdiction over the issue of the lender's damages pending the outcome of the foreclosure sale. (*Id.* at p. 30.) The plaintiffs appealed the judgment, and after the issuance of the appellate court's remittitur, the nonjudicial foreclosure sale was held. (*Id.* at pp. 31, 35.)

At issue in *Royal Thrift* was whether the appeal automatically stayed the foreclosure sale. (*Royal Thrift, supra*, 123 Cal.App.4th at p. 35.)[9] The Court of Appeal concluded, "any appellate stay bars action to enforce the judgment, including nonjudicial or private action. Automatic stays thus halt a nonjudicial foreclosure sale, which is a statutorily authorized adjudication of rights under a trust deed. [Citation.]" (*Id.* at p. 36.) Defendant's reliance on *Royal Thrift* is misplaced because that case concerned a judgment that was not self-executing and did not discuss the concept of self-executing judgments. By reserving jurisdiction in the trial court to determine the lender's damages following the foreclosure sale, the judgment required further court action in order to accomplish one of the purposes sought, i.e., the lender's claim for damages.

Finally, defendant argues that had he performed his contractual duties under the parties' contract during the pendency of the *Beth I* appeal, he would have waived his right to appeal the 2005 judgment. The argument lacks merit. Generally, a party impliedly waives the right to appeal by voluntarily accepting the benefits of the judgment. The theory is that the right to accept the benefits of a judgment is inconsistent with the right to appeal, so that an election to accept the benefits of the judgment is deemed a renunciation of the right to appeal. (*Lee v. Brown* (1976) 18 Cal.3d 110, 114; *American Alternative Energy Partners II v. Windridge, Inc.* (1996) 42 Cal.App.4th 551, 557 (*Windridge*); Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2008)

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9 The issue arose in the context of a claim by the appellants that the lender had improperly postponed the foreclosure sale in contravention of Civil Code section 2924g, subdivision (c)(1). (*Royal Thrift, supra*, 123 Cal.App.4th at p. 34.)

¶ 2:327, p. 2-149.) However, where as here, the judgment did not expressly confer any benefits on the appellant, the waiver rule does not apply. (*Windridge*, at p. 558.)[10]

The trial court erred in relying upon section 916 to deny plaintiffs' motion in limine to admit evidence of their September 23, 2005 letter to defendant and entering judgment for defendant in the instant breach of contract action.

DISPOSITION

The judgment is reversed. Costs on appeal to plaintiffs.

SIMONS, J.

We concur.

JONES, P.J.

BRUINIERS, J.

10 We also note that if defendant were concerned with losing his right to appeal the judgment regarding the property's fair market valuation, or preserving the status quo until the appeal was decided, he could have sought a stay in the trial court (see *Nuckolls v. Bank of California Nat. Assn.* (1936) 7 Cal.2d 574, 577) or sought a writ of supersedeas in this court (see *People ex rel. S. F. Bay etc. Com. v. Town of Emeryville* (1968) 69 Cal.2d 533, 536; *Veyna, supra*, 170 Cal.App.4th at pp. 156-157; *McFarland v. City of Sausalito, supra*, 218 Cal.App.3d at p. 912). He did neither.